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CITATIONS

665507—45——1

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 297

THE ARUNDEL CORPORATION, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the Court of Claims (R. 58–62, 62–64) have not yet been officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on May 7, 1945 (R. 64). The petition for a writ of certiorari was filed on August 4, 1945. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED

1. Whether a dredging contractor, whose contract called for a stated sum per cubic yard, can

recover judgment in the Court of Claims despite its failure to show that the alleged breach of contract by the Government materially affected the unit cost or the monthly progress of the dredging work.

2. Whether a dredging contractor with the Government, under a specific duty by the terms of its contract to complete the dredging project without regard to initial estimates of the quantity, is entitled to an adjustment of the contract unit price pursuant to the provisions of Article 4 relating to changed conditions, solely by virtue of a reduction in the quantity of material to be dredged caused by heavy tidal scour, after the acceptance of the bid.

CONTRACT PROVISIONS AND SPECIFICATIONS INVOLVED

The pertinent contract and specifications involved herein are set out in the Appendix, *infra* pp. 14–17.

STATEMENT

On August 4, 1938, the United States advertised for bids, to be opened on August 24, 1938, for dredging work in the Cape Cod Canal (R. 41). The portion of the project here involved, Section A, consisted of dredging the north side of the canal, the distance being divided into subsections running from Station 110+00 to Station 375+00 (R. 41, 44). The specifications which accompanied the above-mentioned advertisement stated that the quantity to be excavated in Section A was 2,894,-

500 cubic yards (R. 42).[1] The bidding contractor was put on notice that the United States gave no warranty as to quantity of material to be dredged (R. 46), and was advised that the entire quantity of material necessary to complete the project would have to be excavated, whether such quantity was more or less than such estimated amounts (R. 44). Possibility of erosion by reason of tide scouring was noted (R. 45).[2]

Petitioner, at 34.73 cents per cubic yard, was low bidder on the Section A project (R. 42). This bid being considered excessive by the Government engineers,[3] negotiations with petitioner resulted in a compromise figure of 34 cents per cubic yard, on which basis a contract was entered into on or about September 10, 1938 (R. 42, 49). The formal contract was executed on October 6, 1938, work to begin within 30 calendar days of notice to petitioner to proceed (R. 43). Pursuant to notice, petitioner's dredging operations began on November 29, 1938, and were completed on June 12, 1940 (R. 43).

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[1] This estimated quantity was composed of 2,423,000 cubic yards of material necessary to be removed plus 471,500 cubic yards maximum allowable overdepth dredging (R. 44), determined by Government surveys in June and July, 1938 (R. 47–48).

[2] The specifications which accompanied the invitation to bid became part of the contract (R. 41, 19–20, 23, 33–34).

[3] The Government estimate of cost for Section A was 30.9 cents per cubic yard (R. 42).

A hurricane, which occurred on September 21, 1938, set up unusually strong tides along the New England coast and scoured out a substantial quantity of material from the Section A area, amounting to approximately 425,950 cubic yards, with the greatest amount of change (approximately 317,000 cubic yards) taking place at the easterly end of the project between Stations 110 and 190 (R. 49–50). Neither petitioner nor the United States was aware of the effect of the hurricane tides on the project until the customary Government predredging survey was made in October and November, 1938 (R. 49).

Petitioner, upon being advised of the result of the survey in January, 1939, requested a contract price adjustment or the grant of compensating yardage (R. 49–50). On January 17, 1939, the Government asked petitioner to furnish details in support of the requested price increase (R. 50). Thereafter, by letter of March 6, 1939, petitioner stated that the material scoured was of the more easily dredgeable type and that most of the scouring had occurred between Stations 110 and 190, the area of estimated maximum production due to character of material and short tow to the disposal area (R. 50).

The price increase requested was 1.96 cents per cubic yard (R. 50). Upon receipt of petitioner's letter of March 6, 1939, the Government again requested facts and figures which would support

the requested contract price adjustment (R. 50). Thereafter, on May 19, 1939, petitioner advised the contracting officer that its request for a unit price increase was made under the changed-condition provisions of paragraph 4–01 of the specifications [4] and was based entirely on "reduced production between stations 110 and 190," a "changed condition due to an act of God * * *" (R. 51). Some estimate of the anticipated effect of the change accompanied petitioner's letter of May 19, 1939.

The contracting officer denied petitioner's request for an increase in price (R. 52). The denial noted that no dredging between Stations 110 and 190 had yet been performed by petitioner and that the requested price increase appeared to be based on anticipated events (R. 52). Further, the contracting officer ruled that the quantity of dredging set forth in the specifications was given solely as an approximation; that no warranty had been made by the Government that such quantity would actually be found within the dredging limits; and that the specific duty had been assumed by the contractor, as required by the specifications, to complete the project whether the quan-

[4] By paragraph 4–01 of the specifications, the price adjustment procedure of Article 4 was made applicable if, in the opinion of the contracting officer, "materials, structures, or obstacles of a substantially different *character*" were encountered (R. 46, 50–51; Appendix, *infra*, pp. 14–15, 16–17). [Italics supplied.]

tity of dredging be more or less than the estimated yardage (R. 52–53). The contracting officer pointed out that notice had been given in the specifications that a reduction in quantity by reason of scour was to be expected, and noted that no showing of fact in support of the alleged increase in operating cost could be made until work in the subsection involved (Stations 110 to 190) had been performed (R. 53).

In accordance with the standard dispute procedure contained in Article 15 of the contract (R. 47; Appendix, *infra*, pp. 14–15), petitioner appealed to the Chief of Engineers from the decision of the contracting officer (R. 53).[5] The Chief of Engineers ruled that no changed condition, warranting additional compensation, within the meaning of Article 4 of the contract or paragraph 4–01 of its specifications was presented. He found that no difference of character within the meaning of these contract provisions existed by reason of the reduction of yardage. As to any contention that a difference in quantity brought the situation within Article 4 or paragraph 4–01, he pointed to the specific denial by the Government of responsibility for quantity estimates and

[5] By paragraph 1–13 of the contract specifications, the Chief of Engineers was designated as the duly authorized representative of the head of the department concerned to decide disputes in accordance with the provisions of Article 15 of the contract (R. 47).

the duty placed on the contractor to complete the work, regardless of estimated quantity (R. 54).

The decision of the Chief of Engineers on petitioner's appeal was rendered on October 17, 1939 (R. 54). As of that date, substantially no dredging operations had been performed in the subsection here involved (R. 54). The work in the subsection was performed principally in October, November, and December, 1939, and January 1940 (R. 54).

On March 24, 1942, petitioner instituted this suit in the Court of Claims, alleging that the reduction of yardage caused by hurricane tide scour constituted "subsurface conditions materially differing from those shown on the contract drawings or indicated in the specifications" within the meaning of Article 4 of the contract, and prayed damages in the amount of $39,565.60 (R. 4, 6).[6]

After finding the facts as set forth above, the court below found that petitioner had failed satisfactorily to establish that the reduction in dredging yardage due to the hurricane had materially affected petitioner's monthly progress or its unit cost in carrying out the project (R. 58).[7] The

[6] This amount was reduced by petitioner to $34,550.88 in connection with the schedule introduced by it in the court below to support its claimed increase in unit price (R. 57).

[7] The court below, in findings 16–21 (R. 55–57), discussed a schedule offered in evidence by petitioner in support of its request for an increase in unit price. This schedule did not

court below further found that a variation between estimated and actual monthly dredging ranging from 3 to 10 percent was reasonable in the Cape Cod Canal; and that petitioner's actual monthly dredging was 3.8 percent lower than its estimated monthly dredging for the entire Schedule A project, 8.6 percent lower in the subsection primarily involved herein (R. 57–58).[5] In its opinion, the court below (Judge Madden dissenting) rejected petitioner's contention that the reduction in dredging yardage caused by the hurricane constituted a changed condition within the meaning of Article 4 of the contract (R. 58–62) and held that the United States was only bound herein to make an equitable adjustment under Article 4 of the contract and paragraph 4–01 of the specifications in the event that the contractor encountered materials, structures, or obstacles of a substantially different character from those de-

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purport to reflect petitioner's actual costs but merely to show "that had the actual yardage and the time required for its removal been known when the bid was submitted, a higher bid, 35.73 cents per cubic yard, would have been submitted" (R. 57). As shown by its finding that the record did not establish an increase in petitioner's unit cost by reason of the hurricane tides (R. 58), the court below did not find, as implied by petitioner, that petitioner's evidence justified an increase in unit price of 1.73 cents per cubic yard (Pet. 8).

[5] The greatest variation between estimated and actual monthly dredging production on this project took place in the subsection least affected by the hurricane (R. 58).

scribed in the contract (R. 60–61). Accordingly, the court below dismissed the petition (R. 58).

ARGUMENT

1. Petitioner, in the Court of Claims, alleged that the "failure and refusal of the defendant's representatives to modify the contract price constituted a breach of the aforesaid covenant [Article 4] which resulted in damage to plaintiff" (R. 5) and that "plaintiff makes claim herein for that sum [$39,565.60] as actual damages or increased costs caused by the Government's failure to perform its part of the contract as set forth in the covenant in Article 4 thereof" (R. 6). Petitioner does not challenge, and is bound by, the finding of the court below (R. 58) that the record failed satisfactorily to establish that any material effect on its unit costs or monthly progress resulted from the reduction in yardage here in issue. *United States* v. *Esnault-Pelterie,* 299 U. S. 201, 205–206. Thus petitioner failed to establish the damages or increased costs which it alleged. Irrespective of the question of breach, therefore, the judgment of the court below was fully justified by petitioner's inability to prove damage and is sustainable on that ground alone. *Nortz* v. *United States,* 294 U. S. 317, 327; *Marion & Rye Valley Railway Company* v. *United States,* 270 U. S. 280, 282; cf. *United States* v. *Smith,* 94

U. S. 214, 218–219; *United States* v. *Wyckoff Pipe & Creosoting Company, Inc.*, 271 U. S. 263, 267.

2. Petitioner, ignoring the finding discussed above[9] and referring generally to the importance of standard Government contract provisions, requests an "authoritative determination of the meaning and application" of Article 4 (Pet. 10). Even assuming that the facts of this case present a question of the interpretation of Article 4 which this Court, in appropriate circumstances, might review, we submit that the decision below is correct. The petition herein necessarily rests upon the contention that a reduction in quantity of the yardage to be dredged constituted a changed condition within the meaning of Article 4 of the contract and paragraph 4–01 of the contract specifications.[10] Neither the facts of the instant case nor the language of Article 4 support this contention.

At each stage of the transactions here involved, the Government took precautionary measures to avoid making warranties or binding representa-

[9] It should be noted that the dissenting judge below also ignored the finding and based his opinion on the assumption, contrary to the record, that petitioner was in a "financial plight" as a result of the reduction in yardage (R. 63).

[10] In its initial request for price revision in accordance with the administrative procedure of the contract, petitioner referred to paragraph 4–01 of the specifications as the basis for the change (R. 51), apparently urging that the scouring of easily dredgeable material constituted a change in the "character of materials" as contemplated by its provisions (R. 50, 54). This argument is not urged in the instant application for review.

tions as to the amount of material to be dredged. Its quantity figures were specifically labelled estimates and the duty of completing the project without regard to such estimates was cast upon petitioner by a clear provision of the specifications. The possibility of reduction in quantity by reason of tide scouring was brought to petitioner's attention both in the invitation to bid and in the contract. Obviously, the Government did not undertake responsibility for quantity in letting this unit price dredging contract. Conversely, the Government, by paragraph 4–01 of the specifications, did bind itself to make price adjustments under Article 4 if, in the opinion of the contracting officer, a change in the character of materials was encountered. On this basis, petitioner bid for and obtained the contract. The court below gave proper effect to these provisions and held the Government free of obligation to revise petitioner's contract unit price solely by reason of reduction in the quantity of material to be dredged, a result in accord with the "* * * intention of the parties to this contract that payment was to be made on a yardage basis * * *" for the quantity of material actually removed. *Tacoma Dredging Co.* v. *United States,* 52 C. Cls. 447, 452.

Finally, the language of Article 4 does not support petitioner's contention. As the court below appropriately observed (R. 61):

> The subsurface or latent conditions materially differing from those shown or indicated in the contract, referred to and contemplated by the first part of art. 4, were subsurface or hidden conditions which actually existed but were unknown by either party at the time the specifications and drawings were prepared and at the time the bid was submitted and accepted, and because of which unknown conditions the representation or indication in the plans and specifications would have to be substantially varied or changed in order for defendant to obtain the completed work as called for and intended by the contract.

Although petitioner relied (Pet. 9) upon the first classification of changed conditions in Article 4 in its petition in the Court of Claims (R. 4), it here also urges that it falls within the second classification of "unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications." But, insofar as the loss of material was caused by scouring, it was a condition well known to both parties and, insofar as the hurricane was the efficient cause, it was an act of God against which the contract did not protect. *Arundel Corporation* v. *United States*, 96 C. Cls. 77, 115–116. Cf. *Tacoma Dredging Company* v. *United States, supra.*

CONCLUSION

The decision below turns on the particular facts of this case. No question of importance is presented and there is no conflict. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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